Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1441

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAROLD E. STAPLES, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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14 pp

QUESTION PRESENTED

Whether the district court erred in instructing the jury that, in order to convict petitioner of a violation of 26 U.S.C. 5861(d), the government was required to prove only that petitioner knew the weapon he possessed was a dangerous device of the type that would alert one to the likelihood of regulation, and not that he knew it possessed all of the physical characteristics of a machine-gun.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 971 F.2d 608. The opinion of the district court denying petitioner's motion to set aside the verdict (Pet. App. 34a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1992. A petition for rehearing was denied on November 4, 1992. Pet. App. 32a-33a. On January 22, 1993, Justice White granted petitioner an extension of time to and including March 4, 1993, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on one count of knowing possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d). He was sentenced to five years' probation and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-31a.

1. On December 29, 1989, petitioner's house was searched pursuant to a search warrant by agents of the Jenks, Oklahoma, Police Department, and the Bureau of Alcohol, Tobacco, and Firearms (BATF). The agents found an M-1 rifle, an AR-15 assault rifle lacking a magazine and a bolt carrier, a high-powered rifle scope, and numerous other weapons parts, including an M-16 bolt carrier. The AR-15 had never been registered to petitioner under the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.* Pet. App. 2a-3a.

The AR-15 is the semi-automatic version of the military's M-16 automatic rifle; unless it has been altered, the AR-15 can fire only one shot with each pull of the trigger. Petitioner's AR-15, however, had been altered. It had been assembled with a hammer, disconnector, trigger, and selector switch from an M-16. A pin that normally prevents the AR-15's selector switch from being rotated to the fully automatic position had been filed away, leaving a shiny spot on the otherwise-black receiver. When BATF agents inserted the M-16 bolt carrier found with petitioner's AR-15, the weapon fired more than one shot with a single pull of the trigger. Pet. App. 2a-3a; Gov't C.A. Br. 4, 10.

2. The district court instructed the jury that, to establish that petitioner violated 26 U.S.C. 5861(d) by knowingly possessing an unregistered firearm,

> [t]he Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.

Pet. App. 10a. The jury convicted petitioner of illegal possession of the weapon.

3. The court of appeals affirmed. The court followed circuit precedent that established that in order to obtain a conviction under 26 U.S.C. 5861, "the government is not required to prove actual knowledge of a weapon's physical properties"—specifically, that it is capable of automatic fire. Pet. App. 11a (quoting *United States* v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988)).

DISCUSSION

1. Petitioner claims (Pet. 9-28) that 26 U.S.C. 5861(d) requires proof that he knew the AR-15 was a machinegun proscribed by the National Firearms Act, and not merely that he knew the weapon was a firearm in the ordinary sense of that term. The court of appeals correctly rejected that claim.

Under 26 U.S.C. 5861(d), it is "unlawful for any person * * * to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The term "firearm" as used in the Act does not include a semi-automatic weapon, but does include a machinegun, which is defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," or "any combination of parts from which a

machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(a)(6) and (b).

Following *United States* v. *Freed*, 401 U.S. 601 (1971), a majority of the circuits have held that knowledge of a weapon's specific characteristics is not an essential element of the crime described by Section 5861(d). In *Freed*, this Court reversed a district court's dismissal of an indictment under Section 5861, which charged the defendant with possession of unregistered hand grenades, "for absence of an allegation of scienter." 401 U.S. at 607. The Court held that the National Firearms Act required no specific intent or knowledge that the weapons in question were unregistered. Rather, the "only knowledge required to be proved was knowledge that the instrument possessed was a firearm." *Ibid.* The Court found that the imposition of criminal liability with only that element of scienter did not violate the Due Process Clause. As the Court explained, "[t]his is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609; see also *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971) (where "dangerous or deleterious devices * * * are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation").

Following that analysis, most courts have held that "the government does *not* have to prove that the defendant knew that the weapon in his possession was a 'firearm' within the meaning of the statute." *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), cert. denied, 465 U.S. 1037 (1984). Accord *United States* v. *DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973); *United States* v. *Shilling*, 826 F.2d 1365, 1367-1368 (4th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); *United States* v. *Cowper*, 503 F.2d 130, 132-133 (6th Cir. 1974), cert. denied, 420 U.S. 930 (1975); *United States* v. *Ranney*, 524 F.2d 830, 832 (7th Cir. 1975), cert. denied, 424 U.S. 922 (1976); *United States* v. *Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977) (per curiam); *United States* v. *Thomas*, 531 F.2d 419, 420-422 (9th Cir.), cert. denied, 425 U.S. 996 (1976); *United States* v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), cert. denied, 485 U.S. 980 (1988).

In our brief in opposition in *Ross* v. *United States*, cert. denied, 498 U.S. 1122 (1991) (No. 90-6405), we acknowledged that some courts have recognized a narrow exception to the general rule that knowledge of a weapon's specific characteristics is not an essential element of the crime. At the time of *Ross*, the Fifth, Sixth, and Ninth Circuits had held that such knowledge is required when the statute is applied to weapons that appear on visual inspection to be semi-automatic, and thus not covered by the statute, although they have been internally modified to be fully automatic. See *United States* v. *Anderson*, 885 F.2d 1248, 1251-1255 (5th Cir. 1989) (en banc); *United States* v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989); *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir.), cert. denied, 464 U.S. 821 (1983); see also *United States* v. *O'Mara*, 963 F.2d 1288, 1290-1291 (9th Cir. 1992) (following *Herbert*). Those courts reasoned that in unusual cases in which a semi-automatic weapon has been modified to be fully automatic with no outward markings to show that it has been altered, the possessor has no notice of the likelihood of regulation. In that setting, those courts held, the government must prove that the defendant knew the unregistered firearm he possessed could fire automatically

and thus was a "firearm" within the proscription of the NFA.

After we filed our brief in *Ross*, the D.C. Circuit decided *United States* v. *Harris*, 959 F.2d 246, cert. denied, 113 S. Ct. 362 (1992). In *Harris*, the defendants were convicted of violating 26 U.S.C. 5861(d) based on their possession of an unregistered MAC-10 machinegun. 959 F.2d at 249, 258. The jury was instructed that it could convict the defendants if they knew the MAC-10 was a gun, even if they did not know it was a machinegun. *Id.* at 258. The D.C. Circuit reversed, holding that the defendants could not be convicted without proof that they knew the weapon was a machinegun as defined in the NFA. *Id.* at 260. The court did not distinguish between weapons originally constructed as machineguns and those that had been converted from semi-automatic weapons; the MAC-10 involved in the case apparently was of the former class. The court concluded that "[t]he circuits are split on this issue."[1] *Ibid.* In light of *Harris*, we agree with petitioner (Pet. 9-28) that the circuits are divided over whether knowledge of a weapon's specific characteristics is an essential element of the crime described by Section 5861(d).

To be sure, the split in the circuits noted in *Harris* will not directly affect all federal prosecutions for illegal possession of machineguns. As we recently explained in our brief in opposition in *Jones* v. *United States*, No. 92-7025, the Criminal Division of the Department of Justice has instructed the United States Attorneys that any case involving the possession or transfer of a

[1] Since the court of appeals reversed on that count, the issue of the proper standard of intent under 26 U.S.C. 5861(d) was not raised in the defendants' petitions for a writ of certiorari in *Harris*, Nos. 91-8167, 91-8328, and 91-8333.

machinegun that was made after May 19, 1986, should be charged under 18 U.S.C. 922(*o*),[2] rather than 26 U.S.C. 5861(d). See 92-7025 Br. in Opp. 11; Criminal Division, U.S. Dep't of Justice, *Federal Firearms Statutes Federal Prosecution Manual* 79-80 (June 1992). That is because Section 922(*o*) entirely forbids individuals from possessing or transferring machineguns not lawfully possessed on May 19, 1986, and thus, through 26 U.S.C. 5812(a), precludes the government from accepting applications to register such guns. Accordingly, the government has determined that it is more appropriate to prosecute an individual found in possession of such a gun for possession under Section 922(*o*) rather than under Section 5861(d).[3]

[2] 18 U.S.C. 922(*o*) provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to—
>
> (A) a transfer to or by, or possession by or under authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Section 922(*o*) took effect on May 19, 1986. Firearm Owners' Protection Act, Pub. L. No. 99-308, § 110(c), 100 Stat. 461.

[3] As we explained in our brief in opposition in *Jones*, at 10-11, there appears to be a split in the circuits concerning the continued viability of Section 5861(d) after the enactment of Section 922(*o*). Compare *United States* v. *Jones*, 976 F.2d 176 (4th Cir. 1992) (holding that Section 5861(d) is still viable), petition for cert. pending, No. 92-7025, with *United States* v. *Dalton*, 960 F.2d 121 (10th Cir. 1992) (holding that Section 5861(d) was impliedly repealed by Section 922(*o*)). The Tenth Circuit in this case held that *Dalton*

Nonetheless, we believe that further review is warranted to resolve the conflict in the circuits presented by this case. First, some prosecutions will continue to be brought under Section 5861(d) for some machineguns manufactured before May 19, 1986, and the scienter issue presented here will apply directly in those cases. Second, the scienter issue in this case is likely to affect prosecutions under Section 922(*o*) as well. Section 922(*o*) ("it shall be unlawful for any person to transfer or possess a machinegun") uses language virtually identical to that of Section 5861(d) ("[i]t shall be unlawful for any person * * * to receive or possess a firearm which is not registered to him"), and the definition of "machinegun" in Section 922(*o*) is borrowed from the National Firearms Act. See 18 U.S.C. 921(a)(23). It is thus reasonable to assume that a conviction for violating Section 922(*o*) requires proof of the same mental state as does a conviction for violating Section 5861(d). The question presented in this case is therefore likely to have sufficient continuing importance to call for this Court's review.

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was not applicable to machineguns that were purchased prior to the effective date of 18 U.S.C. 922(*o*). See Pet. App. 4a-8a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1993